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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 528

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, ET AL.,
Petitioners,

v.

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF THEREON.

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INDEX

	Pages
Petition	1-10
Statement of Case	2-8
Grounds Relied on for Allowance of Writ	8-10
Prayer for Relief	10
Brief in Support of Petition	11-29
The Opinions of the Courts	11
Jurisdiction	12
Statute	12
Statement of the Case	12
Specification of Errors Intended to Be Urged	12
Decision of Court of Appeals is in Conflict with Decision of this Court in Shields, et al. v. Utah-Idaho Central Railroad Company	12
None of the Other Reasons Given by the United States Court of Appeals for the District of Columbia for Holding the District Court Without Jurisdiction, are Sound	14
Lower Court Erred in Holding That Legality of Commission's Action Could Be Determined on Review of Final Order Fixing Prices	15-16
Lower Court Erred in Holding Orders Procedural and Not Subject to Review	16-19
Lower Court Erred in Holding That Issuance of Injunction Here Would Control the Exercise of Administrative Discretion	19-20

Pages

The United States Court of Appeals for the District of Columbia Erred in Failing to Hold That the Threatened Action by the Commission is Specifically Prohibited by the Provisions of the Bituminous Coal Act of 1937 20-28

Conclusion 28

STATUTES

Bituminous Coal Act of 1937 (50 Stat. 72; U. S. C. Title 15) 12
Section 3 23
Section 4 ..... 20, 21, 24, 30
Section 4, Part I 21
Section 4, Part II 3, 21, 22, 30
Section 4, Part II (a) 24, 27, 30
Section 4, Part II (b) 31
Section 4, Part II (c) 27
Section 4, Part II (k) 28
Section 10 (a) 3, 23, 24, 25, 26, 27
Judicial Code, Sec. 240 (a) (U. S. C., Title 28, sec. 348 (a)) 12

CASES CITED

Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375 ..... 17, 18

Interstate Commerce Commission v. C. N. O. & T. P. R. Co., 187 U. S. 479 20

Jones v. Securities & Exchange Commission, (C. C. A. 2) 79 F. (2) 617; 297 U. S. 705 17

Mallory Coal Co. v. National Bituminous Coal Comm., 99 Fed. (2) 399 ..... 6, 9, 13

Myers v. Bethlehem Ship Building Corp., 303 U. S. 41 18

Pages

Peck, et al. v. Jennes, et al., 7 How. 612 25
Perrine v. Chesapeake & Delaware Canal Co., 9 How. 172 28

Shannahan v. United States, 303 U. S. 596 .....9, 13
Shields, et al. v. Utah-Idaho Central R. Co., — U. S. — 7, 8, 9, 11, 12, 13

Spokane & Inland Empire R. Co. v. United States, 241 U. S. 344 25

Township of Montclair v. Ramsdell, 107 U. S. 147 25

United States v. Ewing, 140 U. S. 142 25
United States v. Illinois Central R. Co., 244 U. S. 82.. 17

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF THEREON.

To the Supreme Court of the United States:

The Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, Royal Coal Company, Spring Canyon Coal Company, United States Fuel Company, Chesterfield Coal Company, Hi-Heat Coal Company, Sheridan-Wyoming Coal Company, Hotchkiss Coal Company, Mallory Coal Company, Carbon Fuel Company, Dix-

port Coal Company, The Hanna Coal Company of Ohio, Pittsburgh Coal Company, Jamison Coal and Coke Company, Westmoreland Coal Company, Rochester and Pittsburgh Coal Company and Hillman Coal & Coke Company, jointly and severally petition this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia, to remove from that Court for review here, the record in the case therein, No. 7247, *Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, et al.*, v. *National Bituminous Coal Commission, and Percy Tetlow, Pleas E. Greenlee, et al.*, wherein petitioners are appellants and the National Bituminous Coal Commission and the members thereof are appellees, in which case that Court announced its decision not yet reported, and order December 5, 1938, in which decision the respondents herein were the successful parties adversary to these petitioners.

Statement of Case.

The decision sought to be reviewed affirmed the judgment of the District Court of the United States for the District of Columbia, dismissing petitioners' bill of complaint for injunction and petition for declaratory judgment, and denying a motion for temporary injunction (R. 29). Inasmuch as defendants moved to dismiss the bill of complaint, there is no dispute as to the facts, and except as otherwise noted, the statement of the case is derived from petitioners' bill of complaint (R. 3-15). The controversy herein involves the construction of various provisions of the Bituminous Coal Act of 1937, set out below, but, as will appear from the opinion of the Court below, that court held it had no jurisdiction to decide such controversy.

The Bituminous Coal Act of 1937 created the Commission whose duty it is, among other things, to prescribe by order, after notice and hearing, minimum prices to be charged by producers of coal who are members of the Bituminous Coal Code for coal sold by them which is subject to the Code.

Petitioners are, and at all times mentioned in the bill of complaint have been, members in good standing of the Bituminous Coal Code, promulgated by the respondent Commission. The provisions of the Bituminous Coal Code are prescribed in the Act. These minimum prices are related to cost of production, and in order that the Commission may know what these costs of production are, the Act provides for the submission to the Commission by producers of data disclosing their costs and sales realization (Appendix p. 30). Section 4, Part II, of the Act, provides in part as follows:

> "The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:
>
> "(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information."

Section 10 (a) of the Act provides as follows:

> "Sec. 10 (a). The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be

injurious to the interests of any producer and, as so compiled, may be published by the Commission."

On July 15, 1937, the Commission entered its Order No. 15. In that order the Commission recited that to perform effectively its duties under the National Bituminous Coal Act of 1937, it was required to be fully informed as to the production and distribution of bituminous coal, and that pursuant to the authority conferred on it by Section 10 (a) of the Act, each producer of bituminous coal, including petitioners, was directed to file with the Commission a complete report showing the detailed cost of tonnage produced and realization prices derived from the sale of coal; that such reports were to be made separately for each mine and to include all coal produced during the calendar year 1936 and all coal sold during the same period. A copy of this order was sent by the Secretary of the Commission to each known coal producer within the United States, together with cost forms, which the Commission had provided for the making of such reports. Each producer was required by the order to file, and the petitioners did file, duly verified reports with the Statistical Bureau of the Commission for the district within which the reporting mine or mines were located. The order referred to contained the following provision:

"The Commission directs special attention to the provisions of section 10 of said Act relating to the confidential nature of the report required under this order, and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced."

The cost forms prepared by the Commission accompanying the Commission's order, which were used by petitioners in submitting their detailed production costs and sales realization, bore at the top in bold type, the following statement:

"THIS REPORT IS REQUIRED UNDER THE PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937 AND IS THEREFORE CONFIDENTIAL."

Petitioners as members in good standing of the Bituminous Coal Code, and pursuant to the requirement of said order and the provision of Section 4, and relying on the confidence imposed by such provision, as well as the statement above quoted, prepared and filed with the Statistical Bureau of the Commission, for their respective districts, complete cost and realization reports for 1938 for each of their mines.

After these reports had been thus filed by petitioners, the Commission, on March 30, 1938, made and promulgated a ruling in which it announced that it would thereafter give public notice of a hearing to be held to determine the weighted average of the total costs of the tonnage of coal for each minimum price area (as defined in the Act), in the calendar year 1936, adjusted as provided in Section 4, Part II, of the Act. In its ruling the Commission further announced that at such hearing the information obtained from individual coal producers with respect to individual costs of production of coal of such producers in the calendar year 1936 would be made available by the Commission for inspection and introduction in evidence for certain specified purposes, and that it construed Section 10 (a) of the Act as authorizing such a disclosure in such manner and under such circumstances.

Thereafter certain of the petitioners herein filed a petition with the Commission, which objected to the Commission's ruling of March 30, 1938, as erroneous, and which prayed, *inter alia*, for a hearing, and that upon consideration of the facts and circumstances recited in the petition and the provisions of the Bituminous Coal Act of 1937, the Commission vacate the ruling and rescind its construction of Section 10 (a) of the Act. The Commission thereupon assigned that petition for hearing and the petitioner, Mallory Coal Company, and certain other coal producers, participated in that hearing. As a result thereof, on June 1, 1938, the Commission filed its report, findings of fact, and opinion, and made and entered an order as of that date. In

that order the Commission adhered to its ruling of March 30, 1938, reciting the substance of the petitions and the evidence of injury, and thereupon denied said petitions and ordered and directed:

> "That the Secretary of the Commission be and he is hereby directed to cause the individual cost returns of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required."

The petitioner, Mallory Coal Company, and certain other coal producers, believing that the Bituminous Coal Act of 1937 properly construed prohibited the Commission from disclosing the cost and sales realization data filed by them with the Commission in the manner threatened, and being thus aggrieved by the order of the Commission of June 1, 1938, filed a petition for review by the United States Court of Appeals for the District of Columbia, pursuant to the provisions of Section 6 (b) of the Act. That petition was heard and considered by that Court, and on August 1, 1938, in No. 7178, *Mallory Coal Company, et al.* v. *National Bituminous Coal Commission*, 99 Fed. (2) 399, the Court dismissed the petition on the ground, *inter alia*, that the order entered by the Commission was not a reviewable order under the provisions of Section 6 (b).

On August 31, 1938, the Commission made and entered orders directing the Secretary of the Commission to cause the verified cost reports of all the individual producers in the various districts, including petitioners, "to be made available for inspection during business hours", on and after certain dates named in the order, by those interested parties who had filed appearances in the proceeding before the Commission.

Still believing that the Act properly construed prohibited the Commission from disclosing their costs and sales realization data in the manner threatened, having no remedy at

law or by way of review, and being threatened with action which would subject them to irreparable injury, the petitioner, Mallory Coal Company, as well as these other petitioners, on September 7, 1938, instituted this action in the United States District Court for the District of Columbia, to enjoin the Commission from making the threatened disclosure, and praying for a declaratory judgment. The District Court filed no opinion, but in its order dismissing the bill of complaint and denying the motion for a temporary injunction (R. 18), stated that the acts sought to be enjoined were authorized by and not in violation of the Bituminous Coal Act of 1937. On application of petitioners to the United States Court of Appeals for the District of Columbia, an injunction pending appeal was granted, whereby the defendants were enjoined "from making available for inspection by interested parties, or others, the individual verified cost reports of the petitioners, as described in the bill of complaint and in the orders of the National Bituminous Coal Commission, promulgated August 31, 1938, in Docket 15, of said Commission". Thereafter, on December 5, 1938, in No. 7247, *Utah Fuel Company et al.* v. *National Bituminous Coal Commission, et al.*, the United States Court of Appeals for the District of Columbia affirmed the judgment of the lower Court dismissing the bill and denying the motion for injunction, on the ground, as appears from the opinion of that Court filed herewith as a part of the record, that the District Court did not have jurisdiction either under its general equity jurisdiction or under the Declaratory Judgments Act, to determine the legality of the Commission's threatened action (R. 23-28).

On December 8th petitioners filed with the United States Court of Appeals for the District of Columbia their petition for rehearing, wherein, among other things, they called the Court's attention to the apparent conflict between its decision and the decision of this Court in the case of *Shields, et al.* v. *Utah-Idaho Central R. Co.*, as hereinafter set forth. At the same time petitioners filed with said Court a motion for stay pending disposition of the petition for rehearing,

and, in the event it be denied, pending action by this Court. On December 10, 1938, the Court of Appeals of the District of Columbia entered the following order (R. 30):

> "It is ordered by the Court that the petition for rehearing be, and it is hereby, denied.
>
> "It is further ordered by the Court that the mandate of this Court herein be, and it is hereby, stayed until the 10th day of January, 1939, and that, in order to maintain the status quo pending the application for certiorari, the injunction heretofore issued by this Court is hereby continued in force and effect pending action by the Supreme Court, conditioned, however, upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within 10 days from the date of this order."

Grounds Relied on for Allowance of Writ.

The grounds relied on by petitioners for the allowance of the writ are:

1. The United States Court of Appeals for the District of Columbia failed to give proper effect to an applicable decision of this Court, in that it failed to apply and follow the decision of this Court in the case of *Shields, et al.* v. *Utah-Idaho Central R. Co.*, handed down on December 5, 1938, the same day upon which the opinion and judgment of the United States Court of Appeals for the District of Columbia was rendered. By petition for rehearing, filed by appellants on the 8th day of December, 1938, the attention of the United States Court of Appeals for the District of Columbia was called to the apparent conflict between its opinion in this case and the opinion of this court in *Shields, et al.* v. *Utah-Idaho Central R. Co.*, but by order entered on the 10th day of December, 1938, said petition was denied. In *Shields, et al.* v. *Utah-Idaho Central R. Co.*, this Court held that "equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal action", and this although the determination of the Interstate Commerce Commission, there involved, was

an "order" reviewable under the Urgent Deficiencies
t of October 22, 1913, as had already been held by this
urt in *Shannahan* v. *U. S.*, 303 U. S. 596. The holding
the United States Court of Appeals for the District of
lumbia, that appellants are without remedy in a court
equity because the action sought to be enjoined was re-
wable only by a United States Circuit Court of Appeals
the United States Court of Appeals for the District of
umbia, and further that a court of equity is without
isdiction to grant relief because the threatened injury
se in the course of a proceeding before the National Bi-
minous Coal Commission, is in direct conflict, as peti-
ners submit, with the holding of this court in the case of
elds, et al. v. *Utah-Idaho Central R. Co., supra.*

. The United States Court of Appeals for the District
Columbia has, in basing its decision on the grounds
ted, decided a question of general importance. The de-
on of the Court of Appeals in this case must be con-
ered in connection with its decision in No. 7178, *Mallory*
l Co., et al. v. *National Bituminous Coal Commission,*
ra. Taken together, these two decisions mean that ad-
inistrative bodies in connection with what are called "pro-
ural" matters, may violate with impugnity the statute
m which they derive their authority, in doing so inflict
n persons subject thereto irreparable injury, and at
same time escape judicial control. It is important to
r in mind that, unlike the situation in other cases this
rt has been called upon to decide, if the decision of the
urt of Appeals be not reversed there is no way known
petitioners whereby the legality of an administrative
y's action in relation to a "procedural" matter, which
ion inflicts on persons subject to its jurisdiction irrepar-
e damage, can be tested in a judicial proceeding. In
w of the multiplication in recent years of their powers,
itioners believe this is a most important case.

. This case also involves a question of substance relating
the construction and application of a statute of the

United States which has not been, but should be, settled by this Court, viz., whether the Bituminous Coal Act of 1937, properly construed, prohibits the National Bituminous Coal Commission from disclosing the individual costs and sales realization data filed with it by the individual producers. Inasmuch as the Commission in construing the act to authorize such disclosure does so because in its opinion to do otherwise would raise serious constitutional questions as to the "fairness" of a hearing upon the basis of which its price fixing order is issued, all of which appears, on pages 16-17 of the record filed herewith, from paragraphs 6, 8, 9 and 10 of respondents' motion to dismiss the complaint, this case also involves a question of substance relating to the construction and application of the Constitution of the United States which has not been, but should be, settled by this Court.

Prayer for Relief.

In view of the foregoing, petitioners respectfully pray that a writ of certiorari issue, under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, requiring it to certify and send to this Court a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 7274, *Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, et al., Appellants* v. *National Bituminous Coal Commission, and Percy Tetlow, Pleas E. Greenlee, Thomas S. Haymond, Individually, etc., et al., Appellees,* to the end that this cause may be reviewed and determined by this Court, and that the judgment herein of the said United States Court of Appeals for the District of Columbia be reversed on the grounds urged herein, and for such further relief as to this Court may seem proper.

UTAH FUEL COMPANY, AND OTHER PETITIONERS,

By ROBERT E. QUIRK,
J. V. NORMAN,
Counsel for Petitioners.

IN THE

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NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts.

The opinion of the United States Court of Appeals for the District of Columbia, filed on December 5, 1938, is printed in the record filed herewith at pages 23-28.

The opinion of this Court in *Shields, et al.* v. *Utah-Idaho Central R. Co.*, with which the opinion here is claimed to be in conflict, was also rendered December 5, 1938, and is as yet unreported.

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended. (U. S. C., Title 28, sec. 348 (a).) The date of the judgment to be reviewed is December 5, 1938 (R. 29).

Statute.

The statute here involved is Bituminous Coal Act of 1937 (50 Stat. 72; U. S. C., Title 15, sec. 828-851), the pertinent provisions of which are set forth in the Appendix hereto.

Statement of the Case.

The foregoing petition for writ of certiorari contains a concise statement of the case and in the interest of brevity and to avoid repetition, such statement will not be repeated here.

Specification of Errors Intended to be Urged.

Petitioners would, upon review, contend that the United States Court of Appeals for the District of Columbia erred:

1. In holding that the District Court was without jurisdiction to enjoin the respondents from taking the action which they are threatening to take, and in failing to hold, on petition for rehearing, that its opinion was in conflict with the opinion of this Court, rendered the same day, in *Shields, et al.* v. *Utah-Idaho Central R. Co.*

2. In failing to hold that the action which respondents are threatening to take is specifically prohibited by the provisions of the Bituminous Coal Act of 1937.

Decision of Court of Appeals is in Conflict With Decision of this Court in Shields, et al. v. Utah-Idaho Central Railroad Company.

The Court of Appeals, in its opinion herein, taken in conjunction with its opinion in *Mallory Coal Co., et al.* v. *Na-*

tional Bituminous Coal Commission, 99 Fed. (2) 393, holds that as to every matter arising between an administrative agency and a person subject to its jurisdiction review must be had in the courts of appeals or in no court at all, and further holds that the petitioners have no remedy because the determination of the Commission was not a final order. It is as to these matters particularly that the petitioners contend, and in their petition for rehearing in the Court of Appeals contended, the decision of the Court below is in conflict with the decision of this Court rendered the same day, in *Shields, et al. v. Utah-Idaho Central R. Co.*

This court had already held, in *Shannahan* v. *U. S.*, 303 U. S. 596, that the determination of the Interstate Commerce Commission, there involved, was not subject to judicial review under the provisions of the Urgent Deficiencies Act. In the *Shields Case* this Court held that such a determination was subject to judicial scrutiny by a single judge District Court under the Court's general equity jurisdiction, inasmuch as the Commission's determination finally determined the rights of the complaining carrier. We here quote from the opinion of this Court in that case:

> "We have held that the determination of the Commission is not an 'order' reviewable under the Urgent Deficiencies Act of October 22, 1913. *Shannahan* v. *United States, supra.* But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the *Shannahan case*, we had no occasion there to consider. Id. at p. 603. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory scheme. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce. * * * Equity jurisdic-

tion may be invoked when it is essential to the protection of the rights asserted. * * * (Italics ours)

Here, as there, the action sought to be enjoined is not an "order" reviewable under the statutes specifically applicable to the administrative agency whose action was sought to be enjoined. Here, as there, the equity jurisdiction invoked is essential to the protection of the rights asserted because unless that jurisdiction is exercised to protect such rights they will be absolutely destroyed. It is therefore submitted that the basis for jurisdiction in the *Shields case* cannot be distinguished from the basis for jurisdiction in the instant case.

None of the Other Reasons Given by the United States Court of Appeals for the District of Columbia for Holding the District Court Without Jurisdiction, Are Sound.

In addition to the rulings in conflict with the decision of this Court, just discussed, the Court of Appeals for the District of Columbia held that the District Court was without jurisdiction for several other reasons. These are:

First: That administrative remedies must be exhausted before judicial review can properly be given;

Second: That the order of the Commission of August 31, 1938 was a procedural order and hence not subject to judicial review; and

Third: The action of the respondents was taken as a result of the exercise of administrative discretion which had properly been confided to it by Congress, and hence that the courts are without power to control the exercise of that discretion, either by mandamus or by injunction.

None of these reasons, as we shall show, is sound when applied to the facts in the instant case.

Lower Court Erred in Holding that Legality of Commission's Action Could Be Determined on Review of Final Order Fixing Prices.

The Court of Appeals appears to have held the District Court to be without jurisdiction because petitioner had not exhausted administrative remedies although nowhere in the opinion does the Court state categorically that petitioners had not exhausted their administrative remedies. The Court seemed to be of the opinion that all questions as to the legality of the respondents' threatened action to disclose petitioners' cost reports could be raised and determined upon review of a final order of the Commission fixing prices and hence that there were further administrative remedies to exhaust.

In the first place it will appear from the record that petitioners have, in fact, exhausted all of their administrative remedies. The first threat of the Commission to take the action complained of was in the form of a ruling of March 30, 1938. The petitioner, Mallory Coal Company, and others, filed a petition in the nature of a petition for rehearing, objecting to this ruling as erroneous. The Commission overruled this petition by order of June 1, 1938, in which it directed the Secretary of the Commission to make the individual cost reports available for inspection by interested parties. Petitioners cannot conceive of any further step that could have been taken by them to persuade the Commission that its construction of the Act was erroneous.

In the second place neither can petitioners conceive of a situation wherein, upon review of a final order of the Commission fixing prices, the question of whether the Commission acted legally or illegally in disclosing their individual cost reports in the manner threatened, could be determined. Certainly petitioners could hardly be said to be aggrieved because a final price-fixing order of the Commission should appear to interested parties to be based on more extensive information than would be the case if these

individual cost reports were not disclosed. Whether they are disclosed or not, the information upon which the Commission bases its order is the same, and it is inconceivable that the illegality of the Commission's action in disclosing these reports could infect the order and render it fatally defective. In any event, at the time the Commission issues its order fixing prices, the question of whether the disclosure of the cost reports was legal or illegal would certainly have become moot inasmuch as the minute they are disclosed the damage is done and cannot possibly be repaired.

It is submitted that every case holding that before judicial review may be had of administrative action administrative remedies must be exhausted, all rights were saved for determination by the Court in the review proceeding except the alleged right to be free from the annoyance and expense of litigation, which this Court has held is no right at all. In this case secrecy of petitioners' cost reports has been specifically required by Congress, presumably on the theory that to disclose them would result in irreparable harm to producers in the coal industry. The ruling and orders of the Commission threatening to disclose these reports finally determines the rights of these petitioners under the Act of Congress, and the disclosure of such reports, in the manner threatened, would result in petitioners having no rights to save for judicial determination on final hearing.

Lower Court Erred in Holding Orders Procedural and Not Subject to Review.

With respect to the holding that the Court was without jurisdiction because orders of Commission were procedural the Court erred in three respects:

First: In assuming that by their action petitioners were seeking to have reviewed judicially any "order" of the National Bituminous Coal Commission;

Second: In holding that the order of August 31, 1938, was a preliminary procedural order; and

Third: In holding that preliminary procedural orders of administrative agencies are not subject to judicial review, when they finally determine rights and result in irreparable injury.

Petitioners' bill of complaint will demonstrate conclusively that they did not bring this action to have enjoined or set aside any order of the Commission. Their action was based on the theory that the Commission was threatening to do an act which was prohibited by the statute, that the order of August 31, 1938, as well as the ruling of March 30, 1938, were simply evidence of this threat, that if the threat were carried out they would suffer irreparable damage, and that the decision of the Court of Appeals in the *Mallory case* held that they had no remedy at law. If the Commission had been satisfied simply with its ruling of March 30th, such ruling would have constituted just as real a threat on its part as does the ruling, coupled with a series of orders telling the Secretary of the Commission how to carry out the ruling. It would seem a strange doctrine if it should be held that the availability or unavailability of equitable relief from administrative action depended on the number of documents the administrative agency issued and what it called them.

The opinion of the Court of Appeals cites *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375; *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82; and *Jones* v. *Securities and Exchange Commission* (C. C. A. 2), 79 F. (2) 617, cert. denied 297 U. S. 705; in support of its contention that preliminary procedural orders of administrative agencies are not subject to judicial review. In each of those cases it will appear that the order there involved was really procedural in character. It in no sense finally determined anybody's rights. The action here, as evidenced by the ruling and the order involved in this case, on the contrary, is as final a determination of rights as a

refusal of executive clemency a minute before the condemned is scheduled to be placed in the electric chair.

Furthermore all that the cases cited hold is that preliminary procedural orders are not subject to judicial review under the usual statutory judicial review provision, found in the pertinent statute. Assuming, for a moment, that the "order" of August 31st is a preliminary procedural order, as the Court below says it is, it does not therefore follow that it is exempt from judicial scrutiny. This Court was very careful to make this clear in the *Metropolitan Edison Case, supra,* in which it said:

> "With respect to other regulatory bodies, it has been held that mere preliminary or procedural orders are not within the statutes providing for *review by the Circuit Court of Appeals.*" (Italics ours.)

But this Court, in that very case, recognized that preliminary procedural orders of administrative bodies were not wholly exempt from judicial scrutiny when it reviewed and found adequate the provisions of the statute there involved with respect to judicial enforcement of administrative subpenas. And in *Myers* v. *Bethlehem Ship Building Corporation,* 303 U. S. 41, this court recognized not only the propriety of but also the need for equitable relief in the case of preliminary procedural orders which finally determine rights when it said:

> "First. There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal * * *."

Nothing in the opinion in the *Myers Case,* the *Metropolitan Edison case,* or in any other case so much as intimates that preliminary procedural orders, which finally determine rights and which to carry out would result in irreparable damage, may not be reviewed in some proceeding other than the usual one for statutory judicial review.

The Court of Appeals gives as reasons for holding preliminary procedural orders not subject to judicial review

under the usual statutory provision, the fact that every minor question which arose as to the propriety of administrative proceedings could be attacked in the courts, with the result that administrative adjudication would become virtually non-existent. Unquestionably this reason is a cogent one but certainly can have no application where a preliminary procedural order is sought to be reviewed by a court of equity under its general equity jurisdiction. Under the usual statutory provision for judicial review, an order of an administrative agency may be enjoined or set aside without any allegation of irreparable injury, and so if review can be had of a procedural order, under such a provision, it is undoubtedly true that the results prophesied by this Court might well become a reality. This certainly would not be the case, however, where jurisdiction of a court of equity is invoked, since irreparable damage has to be both alleged and proved as well as inadequacy of legal remedy.

Lower Court Erred in Holding that Issuance of Injunction Here Would Control the Exercise of Administrative Discretion.

Petitioners certainly do not question the proposition that injunctive relief will not be given where the administrative agency lawfully acts "in a matter properly within its jurisdiction." The question here, however, is whether Congress has confided to the Commission the power to construe a positive prohibition into a command to do the very thing which it prohibited. In all the cases cited by the Court of Appeals as authority for this proposition, the act of Congress clearly gave exclusive jurisdiction to the administrative or executive agency to determine, in the first instance, the matters involved. It cannot be seriously argued that by the provisions of the Bituminous Coal Act Congress intended to grant, or did grant, the Bituminous Coal Commission arbitrary power to reach any conclusion it chose in interpreting the statute. Presumably that statute, like other

statutes, is susceptible of authoritative definition. The intent of Congress, as expressed in the statute, must govern. Petitioners concede, for the purpose of this case, that Congress undoubtedly could have given the Commission the power to disclose or not to disclose the cost reports as the public interest dictated. If Congress had so provided, there is no question but what an injunction enjoining their disclosure would be one seeking to control the exercise of administrative discretion. The question here is whether there was a will to go so far, and the statute itself, the pertinent provisions of which are set forth in the petition for the writ of certiorari, gives the answer. If the Commission is permitted to put an improper construction on the statute, and in doing so utterly destroy the very rights which the statute sought to protect, and that construction is to be considered beyond the reach of the courts merely because the statute may be ambiguous, then the will of Congress is thwarted and to that extent the Commission is exercising not a delegated but a usurped authority. As was stated by the Court in *I. C. C.* v. *C. N. O. & T. P. R. Co.*, 187 U. S. 479:

> "The power given is the power to exercise and enforce, not to legislate."

The United States Court of Appeals for the District of Columbia Erred in Failing to Hold that the Threatened Action by the Commission is Specifically Prohibited by the Provisions of the Bituminous Coal Act of 1937.

The Bituminous Coal Act of 1937 provides for the promulgation of a "Bituminous Coal Code," which sets forth the rights, duties and obligations of those producers of coal who accept such Code. Section 4 of the Act provides in the first three paragraphs thereof, as follows:

> "The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code,' and are herein referred to as the code.

"Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, *and the provisions of such code shall apply only to such code members,* except as otherwise provided by subsection (h) of part II of this section.

"For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal." (Italics ours.)

It was as members of this Code and pursuant to the terms thereof, that plaintiffs here filed the cost reports, which the Commission now threatens to make public. Under Part I, section 4—Organization—the Act provides for the organization of district boards. Part II—Marketing—of Section 4, provides in part as follows:

"The Commission shall have *power to prescribe for code members* minimum and maximum *prices,* and marketing rules and regulations, as follows:

"(a) *All code members shall report* all spot orders *to such statistical bureau* hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and *such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code members filing such information.*

"For each district there shall be established by the Commission a *statistical bureau* which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau." (Italics ours.)

It is important to notice the position in the Act of the provision imposing a confidential character upon the cost and realization reports filed by Code members with the statistical bureaus. The first sentence of Part II of Section 4 grants to the Commission power to prescribe minimum and maximum prices for Code members in the manner thereafter set out. The next sentence of Part II requires Code members to report to the proper statistical bureau *inter alia* "such other information concerning the * * * cost, sale, and distribution of coal as the Commission may authorize or require." Then immediately follows the sentence: "All such records (*i. e.*, those filed with the Statistical Bureau) shall be held by the Statistical Bureau as the confidential records of the Code member filing such information." The juxtaposition of these three sentences would seem to indicate clearly that Congress intended that, in exercising the power conferred in the first sentence to fix prices, the Commission should respect the confidential character of these reports. Otherwise, the third sentence might well have been relegated to some other section where it would not be tied up with exercise of the price-fixing powers of the Commission.

It will therefore be seen that the Code members filed the cost reports here in question pursuant to the terms of a Code which they had formerly accepted, which Code is in the terms of the statute, and provided that such reports should be held "as the confidential records of the Code member filing such information."

This feature of the Act deserves special mention. The Code is not merely one of several sections of a statute of general application. It is more than that—it is the part of the Act which relates peculiarly to Code members. It is singled out from the Act by being required, by Section 5, to be promulgated as a separate document, which is sent to all producers for signature and acknowledgment. A producer who accepts in this manner becomes a Code member. One who does not, incurs none of the liabilities of the Code

nd is not subject thereto at all. If he prefers to pay the enalty provided in Section 3, a producer can remain unffected by the Code. Hence, it is fair to say that Congress ntended that a Code member will find the rights and duties eculiar to him as a Code member set out in the document hich he signs. He finds in this document an unqualified tatement that the information he files with the statistical ureaus shall remain his confidential records. Surely, Conress cannot have intended that this unqualified statement hould be entirely emasculated by the vague and uncertain xception set out in Section 10 (a), a portion of the Act hich is not required to be brought to his special attention t all and which by its terms is applicable to producers as istinguished from Code members.

In requiring the filing of cost and realization reports, he Commission, however, purported to act under Section) (a). This section is no part of the Code and applies to producers." Section 10 (a) provides as follows:

> "The Commission may require reports from *producers* and may use such other sources of information available it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from *a producer* disclosing costs of production or sales realization shall be made public without *the* consent of *the producer* from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission." (Italics ours.)

The Commission now claims the right to disclose the invidual cost reports made by the Code members under the ception in 10 (a), which is applicable to "producers."

Therefore the question presented is as to whether the exception in 10 (a) shall be construed to nullify the provision in Section 4, II (a), which is a part of the Code, pursuant to which Code members furnish their cost reports, and which expressly provides that such reports shall be held as their confidential property, and further whether the exception in Section 10 (a) shall be so construed as to destroy the rule to which it is an exception, as well as the general purpose running through the Act.

The duties of the Code members, with respect to the price-fixing process under the Code, are set forth in the Code and there we find no exception or qualification to the general requirement that the information filed by Code members under Section 4, II (a) shall remain their confidential property. There would be absolutely no need for this general requirement of Section 4 II (a) if Congress intended that it be qualified by the vague exception in Section 10 (a), for Section 10 (a) itself includes provisions relating to non-disclosure of cost information. When we look at Section 10 (a) we find a general power to require reports of producers, as distinguished from Code members, and it is reasonable to suppose that Congress intended this power to be used in connection with the performance by the Commission of its duties other than those set out in Section 4. This construction is further justified by the fact that the power of the Commission to require reports from producers, contained in Section 10 (a), could be excised completely from the statute without interfering in the slightest with the performance by the Commission of its duties under Section 4, that section containing complete authority and power for the Commission to gather information essential to the performance of its duties there set forth. On the other hand, the Commission would be unable to perform its other duties under these other sections without the authority contained in Section 10 (a) to require reports from producers.

Petitioners insist that among the immunities which they obtain for assuming the obligations of Code members is the immunity from the disclosure of their individual cost and realization reports; that the Code expressly so provides and the Code is in the terms of the statute. They further insist that to construe the exception contained in Section 10 (a) so as to authorize a general disclosure of these confidential reports not only violates their rights under the statute and the Code, but also violates two well established rules of construction: (a) That where possible an Act must be construed so as to give force and effect to each of its provisions and to avoid, if may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed. *Township of Montclair* v. *Ramsdell*, 107 U. S. 147; *Peck, et al.*, v. *Jennes, et al.*, 7 How. 612; and (b) "Exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy" the general policy to which it is an exception. *Spokane & Inland Empire R. Co.* v. *United States*, 241 U. S. 344. See also *U. S.* v. *Ewing*, 140 U. S. 142.

The Act sets up elaborate machinery to protect the confidential nature of the individual reports of code members. It provides for statistical bureaus to which such reports shall be made, and provides that "all such records shall be held by the statistical bureau as the confidential records of the code member filing such information." It provides that the district boards shall determine "from cost data submitted by the proper statistical bureau of the Commission" the weighted average of the total cost of the ascertainable tonnage produced in the district in the calendar year 1936, and adjust same to reflect certain changes or trends, and that "Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum price area" and that "The Commission shall thereupon determine the weighted average of the total

costs of the tonnage for each minimum price area in the calendar year 1936," and also adjusted to reflect certain changes and trends.

The Act fairly breathes secrecy with respect to the individual cost data of code members. No one is to see it except the Statistical Bureau, which shall hold it "as the confidential records of the Code member filing such information." The Act then proceeds to provide that "no producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a District Board of employee or representative thereof shall be an employee of any Statistical Bureau," thereby clearly indicating that the District Boards shall not have knowledge of the records which the Statistical Bureau is to hold as confidential.

On the other hand, the District Boards are composed of coal producers, except one member who is a representative of Labor. Why should Congress have been at pains to provide that the reports should be made to the Statistical Bureau, that such Bureau should hold them as the confidential records of the Code member, that no one connected with the coal industry shall be on the Statistical Bureau, that the District Boards should make their determination "from cost *data* submitted by the proper Statistical Bureau of the Commission," that the Commission should make its determination from the figures and computations submitted to it by the district boards, if, by the exception to the rule in Section 10 (a), the whole elaborate design to insure secrecy was to be destroyed by an order of the Commission when it came to hold hearings to establish minimum prices? Such a construction imputes to Congress either an intention to mislead and deceive or ignorance as to the meaning of the exception in Section 10 (a). Can it be that Congress intended, after setting up such elaborate machinery to protect the confidential nature of these reports of Code members, that the Commission should or could nullify the operation of such machinery and defeat the purpose thereof

by simply ordering all such reports made available for inspection?

Why should Congress have provided, as it did in Section 4 II, (a), that "weighted average figures of total cost, determined as aforesaid, shall be available to the public," if it intended that the individual returns from which such weighted average figures are computed should themselves be available for public inspection? Again, why should Congress have provided, as it did in the exception to Section 10 (a), applicable to producers "that such information may be compiled in composite form in such manner as shall not be injurious to the interest of any producer, and, as so compiled, may be published by the Commission "if it intended to give to the Commission authority to make public all the individual returns whether or not injurious to the interest of any producer? Finally, why should Congress have provided, as it did in Section 4 II (a), that the reports of code members "shall be held by the Statistical Bureau as the confidential records of the Code member filing such information "if it intended by the exception in Section 10 (a) that the Commission should make them public? In the light of all these provisions running throughout the Act, it is submitted that the construction of the exception in Section 10 (a) contended for by the respondents is absurd.

The question may be raised, under what circumstances the exception in Section 10 (a) can be applied if it does not permit the general disclosure of all individual cost reports in a hearing seeking to ascertain the weighted average cost. While we consider it is only necessary to establish that the exception is not susceptible to the construction which the Commission has placed upon it in ordering the cost returns made available for inspection, yet we point out that there are numerous instances in which the exception would nevertheless have application. Among these are: (a) On an issue of confiscation where maximum prices are prescribed (Sec. 4, Part II (c)); (b) on an issue of confiscation under minimum prices; (c) on an issue raised by a charge that the in-

dividual Code member has filed insufficient or false information, contrary to his duty as a Code member (Sec. 4, Part II (k)); in a hearing on a petition for exemption from the Code (Sec. 4-A).

It is therefore submitted that making available for inspection the individual cost and realization returns of all Code members does violence not only to the rights of Code members under the Code and to numerous specific provisions of the Act, but to the spirit and purpose which run throughout the Act; and that the Court may not, under any recognized rule or theory of construction, so construe the exception, which is ambiguous at best, as to cause this result. *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172.

Conclusion.

As already shown on motion of petitioners, the Court below entered an order December 10, 1938 which stayed its mandate until January 10, 1939, and which also provided that in order to maintain the status quo pending the application for certiorari, the injunction theretofore issued by that Court "is hereby continued in force and effect pending action by the Supreme Court, conditioned, however, upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within 10 days from the date of this order." Pursuant to the order of the Court below, a petition or motion for a stay will be filed with this Court contemporaneously with the filing of this petition for certiorari.

Without attempting to further summarize or argue the points involved, we submit that they are of such importance in protecting the rights of the citizen when threatened by action of administrative agencies, taken in the course of their proceedings, that they should be determined by this Court.

WHEREFORE, it is respectfully urged that the Court grant the writ of certiorari petitioned for herein.

Respectfully submitted,

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December 15, 1938.

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APPENDIX.

Excerpts from Bituminous Coal Act of 1937.

"SEC. 4. The provisions of *this section* shall be promulgated by the Commission as the 'Bituminous Coal Code,' and are herein referred to as the code.

"Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, *and the provisions of such code shall apply only to such code members,* except as otherwise provided by subsection (h) of part II of this section.

"For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal." (Italics ours.)

* * * * * * * *

PART II—MARKETING.

"The Commission shall have *power to prescribe for code members* minimum and maximum *prices,* and marketing rules and regulations, as follows:

"(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. *All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.*

* * * * * * * *

"Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities and sizes of coal produced in said district, and classification of coal

and price variations as to mines consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'minimum-price-area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, *determined as hereinafter provided,* of the tonnage of such minimum price area.

• • • • • • • • •

"As soon as possible after its creation, each district board shall determine, *from cost data submitted by the proper statistical bureau* of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until change by the Commission, for the proposal and establishment of minimum prices.

• • • • • • • • •

"(b) District boards shall, under the rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities and sizes of coal, and transpor-

tation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at point of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return, *as provided in subsection* (*a*) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of Part II of this section." (Italics ours.)